(8)

No. 85-6756

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

V.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying its case-by-case analysis to determine that upon the record presented the petitioner's claim of a constitutionally deficient capital sentencing proceeding due to his trial attorney's belief that the presentation of non-statutory mitigating circumstance evidence was precluded by Florida law, was without legal basis and insufficient to demonstrate that petitioner was denied an individualized sentencing hearing.

2. Whether the Florida death penalty statute approved in Proffitt against claims that it was arbitary and capricious can be challenged on those same grounds upon a limited statistical analysis proffered to demonstrate a race of victim based disparity systemwide in the imposition of death sentences where no allegation or proof of discriminatory intent was presented.

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SUMMARY OF ARGUMENT

The court of appeals properly applied its case-by-case analysis test in rejecting Hitchcock's claim that Florida's capital sentencing law as applied prior to this Court's decision in Lockett v. Ohio, precluded the presentation of mitigating evidence other than that relating to statutorily enumerated mitigating factors and by operation of law in fact deprived him of an individualized capital sentencing proceeding. As correctly determined by the district court in the summary dismissal affirmed by the court of appeals, the record evidence adduced demonstrated the presentation of non-statutory mitigating evidence throughout the trial and sentencing proceedings sufficient to undermine Hitchcock's claim that his trial counsel believed himself limited in the presentation of such evidence. A wealth of testimony

irrelevant to statutorily enumerated factors was presented to the judge and jury and argued by defense counsel as a basis for sparing the petitioner's life. No limitation by objection or motion of the prosecutor or ruling by the trial judge in any way limited the presentation of non-statutory mitigating evidence at sentencing. The testimony and argument which was in fact presented related to the jury the gist of the non-statutory mitigating evidence which Hitchcock now claims might have been presented and would not have affected the outcome of his sentencing proceeding.

Hitchcock's claim that Florida's capital sentencing law is being discriminatorily applied in violation of the Eighth and Fourteenth Amendments based upon an invidious race of victim based societal prejudice was properly rejected by the district court without evidentiary

hearing and that rejection was correctly affirmed by the circuit court of appeals based upon this Court's specific validation of Florida's death penalty statute as a proper and adequate vehicle for controlling the potential for arbitrary, capricious or discriminatory sentencing that caused the invalidation of Florida's prior capital sentencing law. Mere statistical data cannot serve in and of itself as a sufficient basis for invalidating Florida's presumptively correct capital sentencing scheme absent independent evidence of an intentional discriminatory purpose which mere statistical data cannot supply. Simple numerical tabulations of data which may or may not have been accurately compiled and interpreted and which cannot control for the multitude of variables necessarily involved in the investigation, prosecution, conviction and sentencing in

the capital penalty context cannot provide a legally sufficient basis for invalidating Florida's death penalty statute and all convictions and sentences thereunder (sixteen of which have already been executed) which have been based, in part, on this Court's prior assurance that the law if applied as written would pass constitutional muster.

STATEMENT OF THE CASE

On January 21, 1977, Hitchcock was found guilty of the first degree murder of Cynthia Ann Driggers. The evidence presented at trial showed that approximately two weeks prior to the murder, Hitchcock, unemployed, ill, and with no place to live, came to Winter Garden, Florida, to stay with his brother, Richard. Hitchcock knew that coming to Florida was in violation of his Arkansas parole. (TR 779)[1]

Cynthia Ann Driggers, thirteen years old, was Richard Hitchcock's step-

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[1]The following symbols will be used to refer to the record in the court below: (TR) refers to the transcript of petitioner's January 1977 state trial included in the appellate record; (ASR) refers to the transcript of the advising sentencing hearing before the jury on February 4, 1977; (SR) refers to the transcript of sentencing before the trial judge on February 11, 1977; (JA) refers to the joint appendix herein.

daughter. On the night of the murder, James Hitchcock went out with some friends, drank some beer, and smoked some marijuana. In a statement given to the police, Hitchcock revealed that upon returning to his brother's house, he went into Cynthia's bedroom at about 2:30 a.m. (TR 691) He had sex with Cynthia, and afterwards she stated that she was hurt and was going to tell her mother. Hitchcock told her that she could not, and she began hollering. Hitchcock grabbed her by the neck, and in an effort to silence her, picked her up and carried her outside to the yard. He told her that she could not tell her mother, and she began to scream. He grabbed her by the throat and began choking her, and when he released his grip, she again began to scream and cry out. Even though he hit her twice, she continued to scream; so Hitchcock choked her and "just kept

chokin' and chokin'" and after she was still, he pushed her over in the bushes and went back in the house, took a shower, washed his shirt and went back into his bedroom and lay down. (TR 691-692) Medical evidence showed that Cynthia Ann Driggers was, before the incident, a virgin.

Hitchcock testified at trial and admitted going into Cynthia's room but stated that the sex was voluntary on her part. He stated that he was sitting on the bed putting his pants back on when his brother Richard came in, grabbed Cynthia, and pulled her out of the house. He followed and tried to prevent Richard from choking his own step-daughter. (TR 765) According to James Hitchcock, he could not break his brother's grip and after a time, it was determined that Cynthia was dead. Again, according to James, he told his brother Richard to go into the house and

that he would take care of the matter and then took Cynthia's body and put it in the bushes. (TR 766)

During the defense case petitioner's trial counsel introduced the testimony of a number of individuals including Hitchcock's siblings and his mother relating to the petitioner's non-violent character. (TR 732,734,737,739-740,741,747) In addition, despite the fact that the prosecutor's relevancy objections were in many cases sustained by the court, defense counsel persisted in questioning those who knew Hitchcock as to his family background including: the fact that the petitioner was one of seven children (TR 735,750);his young age at which he left home (TR 735,750); whether the petitioner's natural father was alive (TR 735-736,741,747,748); the petitioner's age when his natural father died (TR 737); the lack of violence

previously exhibited by Hitchcock towards children (TR 742-743,745); as well as the fact that his "attitude" toward his mother and family were good and that he always "minded" his mother and did what he was told. (TR 750)

The petitioner's trial testimony likewise related numerous aspects of his family background for the jury's edification including: his poverty as a child; the fact that he left home at the early age of thirteen because he could not stand his step-father striking and verbally abusing his mother; that he had been "drifting" from place to place since then; that his natural father had died when the petitioner was only six and that his mother had had to work to support the family's many children. (TR 733-735) Furthermore, Hitchcock asserted that his confession was motivated by his desire to protect his

"crippled" brother Richard who had helped him and had been like a father to him and because he felt he had nothing else to live for and nowhere else to go. (TR 776-777)

After a verdict of guilty was returned the advisory sentencing phase of the proceeding was held. Defense counsel again elicited family background information on the petitioner, similar and in addition to that already submitted at trial, through the testimony of one of the petitioner's brothers who noted, inter alia, that: the petitioner's father had died in 1963 after having been bedridden with cancer for eight months; petitioner's natural father and mother had worked as farm laborers in Arkansas in attempting to raise a family of seven children; and that the petitioner on various occasions when he was five to six years old (and

after his natural father's death) had "sucked gas" which had seemingly caused his mind to wander at times. (ASR 7-10)

In conjunction with this testimony and the other evidence as to Hitchcock's family background adduced during the trial defense counsel argued to the jury in the advisory sentencing proceeding that they should consider "anything you feel is relevant" in their determination and evaluate "the whole picture, the whole ball of wax" in deciding whether to impose the death penalty. (ASR 13,52) Defense counsel then specifically recounted the various aspects of Hitchcock's family background presented to them at trial and in the advisory sentencing proceeding in arguing that death was not the appropriate punishment. (ASR 13-16) Specifically defense counsel recounted the fact that Hitchcock was one of seven

children belonging to a farm laborer mother and father whose natural father died in 1963 when the petitioner was only 6 or 7 years old. The large size of petitioner's family and their economic situation along with his step-father's mistreatment of his mother forced the petitioner to leave home at the tender age of thirteen and make his own way in the world for the seven years between then and the trial. (ASR 14-15) The gas sucking incidents were recounted as was the testimony that petitioner's mind would "wander" and that he had no previous history of violence. The fact that the petitioner was a "good child" who "minded" his mother was likewise interjected as was petitioner's alleged truthfulness before the jury (in pointing out his parole violation) and the fact that he had turned himself in despite ample

opportunity to flee. (ASR 15-17,25-26) In addition defense counsel asserted the potential for petitioner's rehabilitation as well as an assertion that the defense was a "crime of passion, an emotional situation" sufficient to distinguish it from more grievous murders. (ASR 24-25) The evidence and argument relating to Hitchcock's family background and other clearly non-statutory mitgating factors was presented to the jury without objection or limitation by the prosecutor or trial judge and at the conclusion of the hearing the jury recommended that Hitchcock be sentenced to death. (ASR 63)

In a separate sentencing proceeding a week later the trial judge considered argument by defense counsel who urged the sentencing judge to take into consideration the testimony concerning

the defendant's background and specifically focused upon the turmoil in his family history. (SR 4-5) Defense counsel asserted that the petitioner was an intelligent individual although "emotionally immature at times" who would be capable of rehabilitation if given the time to mature. (SR 4-5) Furthermore, defense counsel asked the court to consider the possibility of doubt as to the sufficiency of the evidence to demonstrate murder in the first degree. (SR 3-4) However, the trial court in agreement with the jury's recommendation, sentenced Hitchcock to death finding that the capital felony was committed while Hitchcock was engaged in the commission of sexual battery upon Cynthia Ann Driggers; that the capital felony was committed for the one purpose of avoiding being arrested for the involuntary sexual battery; and

that the capital felony was especially heinous, wicked or cruel.[2] In terms of mitigation, the trial court found that Hitchcock's age, twenty, was applicable. Weighing the aggravating factors against the sole mitigating circumstance, the trial court agreed with the recommendation of the jury and found that the recommendation was amply supported by the evidence. Hitchcock appealed his judgment of guilt and sentence of death to the Florida Supreme Court and in his brief dated August 15,

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[2]The trial court also found that Hitchcock had been previously convicted of five burglaries and was on parole at the time he committed the capital felony. Since Hitchcock was not under a sentence of imprisonment at the time, the trial judge did not find the aggravating factor contained in section 921.141(5)(a), Florida Statutes to be applicable. However, as noted by the Florida Supreme Court upon direct review of the conviction and sentence, the fact of parole is, under Florida law, sufficient to satisfy this aggravating factor. See, Hitchcock v. State, 413 So.2d 741,747 n. 6 (Fla. 1982).

1979, containing some fourteen separate issues, contended as a point on appeal that the decision of the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), unconstitutionally limited consideration of mitigating evidence in violation of this court's decision in Lockett v. Ohio, 438 U.S. 586 (1978). On February 25, 1982, that court affirmed both the conviction and sentence, Hitchcock v. State, 413 So.2d 741 (Fla. 1982), finding on this particular issue, that Florida law allowed the presentation of all relevant mitigating circumstances and that the record failed to reveal that the trial judge in any way limited the defense's presentation. 413 So.2d at 748.

Hitchcock then petitioned this Court for a writ of certiorari raising three questions. None of these questions concerned the operation of Florida law in terms of presentation of mitigating

evidence. The petition was denied. Hitchcock v. Florida, 459 U.S. 960 (1982).

On April 21, 1983, the Governor of Florida denied clemency and signed Hitchcock's death warrant. Hitchcock then promptly filed a motion to vacate his death sentence pursuant to Florida Rule of Criminal Procedure 3.850. As one of the grounds presented in that motion, Hitchcock argued that he received ineffective assistance of counsel due to the belief of counsel that he was restricted by Florida's statute to presenting evidence in mitigation relating only to enumerated mitigating factors. The motion was denied without evidentiary hearing. On appeal the denial was affirmed, the Florida Supreme Court finding on the mitigating evidence issue, that it was the same claim in a different form that was argued and considered on direct appeal. Hitchcock v. State, 432

So.2d 42,43 (Fla. 1983). In a concurring opinion, Justice McDonald observed that Hitchcock's lawyer presented and argued non-statutory mitigating evidence such that a claim that counsel was in doubt as to the applicability of such evidence was belied. Id., at 44. (McDonald, concurring).

Hitchcock then sought federal habeas corpus relief in a petition raising some fifteen separate challenges to his conviction and/or sentence. After reviewing the challenges and the state trial record, the district court dismissed the petition without a hearing pursuant to Rule 4 of the Rules Governing Section 2254 in the United States District Courts.

An appeal was taken to the Eleventh Circuit Court of Appeals and that court affirmed the summary dismissal. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984). A suggestion for rehearing en banc

was filed and granted. After briefing and argument, the en banc court of the Eleventh Circuit affirmed the judgment of the district court. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc). Rehearing was denied. Hitchcock v. Wainwright, 777 F.2d 628 (11th Cir. 1985).

I

THE COURT OF APPEALS PROPERLY APPLIED ITS CASE-BY-CASE ANALYSIS IN REJECTING, AS INSUFFICIENT TO OVERCOME RECORD EVIDENCE, THE PETITIONER'S CLAIM THAT HIS TRIAL ATTORNEY WAS PRECLUDED BY OPERATION OF FLORIDA LAW FROM PRESENTING NON-STATUTORY MITIGATING CIRCUMSTANCE EVIDENCE SUCH THAT PETITIONER WAS DENIED AN INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION.

The petitioner's argument begins with a laborious analysis of the history of Florida's post-Furman death penalty statute - section 921.141, Florida Statutes - and the case law interpreting and applying it, in support of his contention that Florida law prior to the Florida Supreme Court's decision in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979) clearly indicated that evidence of non-statutory mitigating circumstances could not be introduced in a capital case. Accordingly, Hitchcock contends that his counsel was precluded "by operation of

law" from submitting relevant non-statutory mitigating evidence as to his character, family background, and potential for rehabilitation, and doubt of guilt for the first degree murder offense for which he had just been convicted, such that he was deprived of the individualized sentencing determination required in capital cases. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, ____ U.S. ____, 106 S.Ct. 1669 (1986).

Petitioner's chief contention is that the decision of the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), limited evidence of mitigation to the statutorily enumerated circumstances and because of the belief of his attorney to that effect, relevant non-statutory evidence in mitigation was not presented at his trial. Thus, he reasons, his

sentence was imposed in violation of the Eighth and Fourteenth Amendments.

Of the many judicial considerations of the decision in Cooper, petitioner understandably relies upon those most favorable to him to support his fundamental premise that Cooper flatly limited the scope of mitigating evidence which could be considered in a capital proceeding. While respondent acknowledges the existence of these pronouncements, he nevertheless questions the ease with which legal commentators and judges have extended an interpretation of Cooper past that found in the original panel opinion, i.e., as containing language"... which some contend should be interpreted as limiting the introduction of mitigating circumstances to those enumerated in the statutes." Hitchcock v. Wainwright, 745 F.2d 1332,1335 (11th Cir. 1984). That there is language which can be so

interpreted is conceded; however, that the language is the holding of the Cooper court is seriously disputed.

STATUS OF FLORIDA LAW

An examination of the decision in Cooper v. State, supra, reveals a mere four paragraphs of judicial expression. Pertinent language is directed only to a claim raising alleged error surrounding the trial court's refusal, on grounds of relevance, of certain testimony proffered during the penalty phase of Cooper's trial relating to his employment history, the victim's reputation for violence, and Cooper's attempt to avoid his co-perpetrator on prior occasions. The defense sought to have this testimony admitted to show that the co-perpetrator (killed during the incident) had probably fired the fatal shots, and that Cooper was not beyond rehabilitation. Importantly, while the trial court rejected these

proffers of evidence, other questionably probative or relevant evidence regarding general character and reputation for truthfulness and non-violence was admitted into evidence. 336 So.2d at 1139.

In holding that the refusal to admit the proffered evidence was not error, the Florida Supreme Court predicated its judgment on its previous decision in State v. Dixon, 283 So.2d 1 (Fla. 1983), stating that only evidence bearing relevance to the issues was to be admitted during the sentencing phases of a capital proceeding. Although the factors in mitigation listed in the statute were mentioned, the holding was nonetheless bottomed only on a notion of relevance. This is precisely what was confirmed in Songer v. State, 365 So.2d 696 (Fla. 1978), and, more importantly, specifically reiterated in Cooper v. State, supra.

Songer contains reference to numerous

decisions where non-enumerated mitigating circumstances were presented to the sentencer and, as pointed out by the district court below, some of those decisions were published prior to Hitchcock's trial. (JA 83-84) The Florida Supreme Court relied upon the decisions as representing its approval of the consideration of non-statutory mitigating factors. Songer v. State, supra, 365 So.2d at 700.

In Meeks v. State, 336 So.2d 1142 (Fla. 1976), the trial court considered the "dull-normal intelligence" of the defendant and found it a mitgating factor. In Buckrem v. State, 355 So.2d 111 (Fla. 1978), and Chambers v. State, 339 So.2d 204 (Fla. 1976), the court recognized voluntary intoxication and drug use. In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the fact that the defendant was under an emotional strain

over mistreatment of his girlfriend by the deceased and his status as a Vietnam veteran were mentioned. In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), the fact that the defendant was not the triggerman was utilized as a basis to reduce the sentence to life imprisonment. In Messer v. State, 330 So.2d 137 (Fla. 1976), the court specifically held that the punishment received by a co-defendant in a separate trial was improperly excluded from the jury because it was relevant, citing to its earlier decision in Slater v. State, 316 So.2d 539 (Fla. 1975). Obviously, punishment received by a co-defendant in a separate trial is not a statutorily enumerated circumstance; yet, it was found admissible because of relevancy to the ultimate issue.

In that vein the legislative history of section 921.141, Florida Statutes

(1972) is of no consequence. What is of sole importance is the law as it was passed in 1972, as interpreted by the Florida Supreme Court. It is that court and only that court which can interpret Florida's capital sentencing statute and that interpretation, i.e., that neither the statute nor any decision of the Florida Supreme Court limited consideration of mitigating circumstances to those found in the statute, is conclusive and binding on all courts. Wainwright v. Stone, 414 U.S. 21 (1973). As a consequence, when the Florida Supreme Court in Cooper v. State, supra, stated that the decision in Lockett v. Ohio, supra, did not change the law of Florida that statement was at once binding and entirely accurate.

Relevance is the operative word in the presentation of mitigating evidence, whether statutory or otherwise. This was

recognized in Lockett. There the Court was concerned with a record in a murder trial which, as the Court seemed to emphasize, contained no evidence of guilt, and a conviction would not have been obtained but for the operation of an aiding and abetting statute. The actual killer (triggerman) pleaded guilty and escaped the penalty of death in return for an agreement to testify against Lockett, her brother, and another perpetrator. The sole participation of Lockett in the offense was the driving of the getaway car. The prosecution offered a plea to a considerably lesser included offense and a substantially reduced sentence three separate times.

Against this backdrop of evidence, the Court centered upon the particulars of Ohio's capital sentencing statute. Under that law, in order to avoid a mandatory death sentence upon the proving of at

least one of seven specified aggravating circumstances, a capital defendant was limited to showing by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) it was unlikely that the offense would have been committed but for the fact that the defendant was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency.

Based on the above facts and law, the holding of this Court was that the Eighth and Fourteenth Amendments required that the sentencer not be precluded from considering as a mitigating factor any aspect of the defendant's character and record or any evidence concerning the circumstances of the offense that the defendant proffered as a basis for a sentence less than death, provided that the evidence is relevant. As a specific

refinement of this general notion, the Lockett court stated:

> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

438 U.S. at 608. Put another way, the Ohio statute was simply too restrictive in terms of relevance.

Since Florida's law is not only more expansive in its list of relevant mitigating factors but also provides for the receipt of all relevant evidence, the Florida Supreme Court was correct in concluding that Lockett did not affect the operation of the state's capital sentencing scheme. Florida's law was specifically mentioned as an obvious example of a non-limiting capital statute. Id. 438 U.S. at 606, n. 15. The source of this notion is, of course,

Proffitt v. Florida, 428 U.S. 242 (1976). Hitchcock easily ignores Proffitt by focusing on the six-day period elapsing between Proffitt and Cooper, thus adopting the view of Mr. Justice BRENNAN in the dissent from the denial of a petition for writ of certiorari in Songer v. Wainwright, ___ U.S. ____, 105 S.Ct. 817 (1985). As we understand the thrust of the contention, since Proffitt so closely preceded Cooper, Cooper was decided without knowledge of Proffitt, and thus the Florida Supreme Court unwittingly reached an interpretation of the statute contrary to that of this Court. The implicit extension of this position is that the Florida Supreme Court, either through possible embarrassment or stubbornness, refused to mend its error and did not do so until and because Lockett was decided. In other words, Songer was the Florida Supreme Court's

effort to save Florida's statute in response to Lockett.

This viewpoint is both incorrect and unfair insofar as it suggests or assumes an improper motive on behalf of the Florida Supreme Court. More importantly, it overlooks the fact that the decision in Cooper was on rehearing from July 8, 1976, until September 30, 1976, an ample period within which the Florida Supreme Court could have become familiar with the "...details in Proffitt's footnotes..." 105 S.Ct. 821, n.9. That the Florida Supreme Court "did nothing" between Cooper and Songer is due to no other obvious reason than the fact that Songer was the first person to raise the direct constitutional challenge as a result of the decision in Lockett.

While the possibility of confusion in the interpretation of Florida law vis-a-vis non-statutory mitigating circumstances

at the time in question has been recognized, the propriety of post-conviction collateral review and relief upon a claim of limitation in the presentation or consideration of non-statutory mitigating evidence has been adequately addressed by the case-by-case analysis theory applied by the court of appeals and the Florida Supreme Court which serves to balance the interest of the petitioner in presentation and resolution of his Lockett-based claim with the state's interest in finality of decisions and timely execution of sentence without undue interference through the collateral review process. Hitchcock v. Wainwright, 770 F.2d 1514 (1985) (en banc); Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc); Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985); State v. Zeigler, 488 So.2d 820 (Fla. 1986); Harvard v. State, 486 So.2d 537

(Fla. 1986); Hitchcock v. State, 432 So.2d 42 (Fla. 1983). This case-by-case analysis provides a reasonable and workable method of review of the specific Lockett-based mitigating circumstance issue through evaluation of the allegations and demonstrations of the petitioner, the status of Florida's law at the date of sentencing, the record of the trial and sentencing, as well as post-trial affidavits or testimony of trial counsel or other witnesses and the proffers of non-statutory mitigating evidence claimed to have been available at the time of sentencing. Hitchcock v. Wainwright, supra, 770 F.2d at 1517. Furthermore, respondent submits that the court of appeals properly applied its case-by-case analysis under the particular circumstances of this case in affirming the decision of the district court (and the state courts) that petitioner's claim

that he was limited in the presentation of non-statutory mitigating evidence was clearly undermined by the trial record.

THE RECORD REFUTES THE ALLEGATION OF RESTRICTION OF MITIGATING EVIDENCE IN THIS CASE

As the court of appeals observed, a number of Florida capital prisoners have raised the concept of restriction in mitigation in varying contexts. 770 F.2d at 1517. The court of appeals reaffirmed, en banc, that it would continue to consider such claims on a case-by-case basis, evaluating the impact of Florida law on each individual capital sentencing hearing. The Eleventh Circuit court announced:

> ... that an analysis should be made in each case presented to evaluate a petitioner's claim on the particular facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury

> instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses, and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be sufficient to support a decision in the absence of an evidentiary hearing.

Id. (JA 123).

Applying the above-quoted analysis, the court of appeals determined, as did the Florida Supreme Court and the federal district court, that the record of Hitchcock's trial belied the argument that the attorney for Hitchcock believed himself to be limited. The court went on to note examples where the lawyer raised matters and intended them to be circumstances in mitigation which were not listed in the statute.

The court of appeals evaluated the affidavit of trial counsel. Considering

it to be "carefully written", the court failed to find sufficient evidence of restrictive belief. The affidavit states only that counsel had reviewed the trial transcript in Hitchcock's case and was of the then present opinion that his perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute. Counsel believed that his review of the transcript indicated that he was acting in accord with such a perception. While he believed that the statute limited the consideration, he did not recall when his perception changed. In fact, the import of the affidavit was slightly misperceived by the court of appeals. Contrary to the court's understanding, counsel did not swear that he did not investigate relevant mitigating circumstances. Rather, he swore only

that he was aware of the then current status of the case in the state court and that in that court, a claim had been made that available evidence of relevant non-statutory mitigating circumstances was not investigated or presented. Nowhere in the affidavit did counsel incorporate, ratify or otherwise adopt that allegation; he was not involved in the state court action which consisted of a motion to vacate filed subsequent to the signing of the death warrant. (JA 44-45)

Interestingly, the decision in Cooper v. State, supra, is not even mentioned. Also, any stated belief of restriction is not alleged in the affidavits; the best counsel could provide was his stated perception of such a belief. However, that perception is rendered worthless by the direct statement that counsel nad no

independent recollection of whether he believed himself limited.[3]

If as petitioner apparently alleges, no non-statutory mitigating evidence was produced, what difference can it make whether that failure was due to counsel believing he was limited or counsel's ineffectiveness? If no

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[3]Hitchcock attempted belatedly to submit a second affidavit of trial counsel attached to his petition for rehearing en banc in an effort to persuade the court of appeals, in light of its holding, that the attorney believed himself limited. Even that affidavit did nothing to require the need for an evidentiary hearing. Though longer than the first, it was not significantly or materially different. The affidavit was still predicated on counsel's eight-year-old perception and interestingly, the final paragraph is still replete with tentative language: "may have been significantly different"; "may have developed"; may have included evidence." Most importantly, counsel still did not swear that he did not investigate all possible areas of mitigation. Also, he did not mention Cooper v. State, supra, and he did not identify any source of perceived limitation. The second affidavit was just as "carefully written" as the previous one.

evidence was produced for either reason then there is clearly a basis for the claim. If, on the other hand, non-statutory mitigating evidence was produced, then there is no basis for such a claim. The obvious source of answering this question, as noted by the court of appeals, is in the record itself and it is the record that undermines petitioner's claim that his counsel believed himself limited in presentation of non-statutory mitigating evidence. Respondent, like the court of appeals below, rejects the claim that counsel believed he was limited in the presentation of mitigating evidence, and the record supports that rejection. Hitchcock v. Wainwright, supra, 770 F.2d at 1517-1518. (JA 124-126)

Indeed, practically the first thing that Hitchcock's lawyer told the jury in his summation during the advisory

sentencing proceeding was that they should consider anything they thought relevant and in his closing to that same jury, defense counsel exhorted them to consider and evaluate "the whole picture, the whole ball of wax" in deciding whether to impose the death penalty. (ASR 13,52) Before the jury defense counsel recounted the various aspects of Hitchcock's family background presented to them at trial[4] as well as similar testimony presented through Hitchcock's brother at the advisory sentencing proceeding in arguing that death was not the appropriate punishment. (ASR 13-16) These clearly non-statutory mitigating factors included reference to Hitchcock's

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[4]Cf. Harvard v. State, 486 So.2d 537, 539 (Fla. 1986) - nonstatutory mitigating factors may arise from evidence presented in trial phase.

impoverished family background; the fact that his natural father had died after having been bedridden with cancer for eight months while the petitioner was very young; that petitioner's natural father and mother had worked as farm laborers in attempting to raise a family of seven children; that the petitioner had "sucked gas" when he was five or six years old and that this had caused his mind to "wander" at times; that Hitchcock had left home at the early age of thirteen because he could not stand his stepfather striking and verbally abusing his mother; that he had been "drifting" from place to place ever since; that his "attitude" towards his mother and family were good and that he always "minded" his mother and did what he was told; that he had been truthful before the jury in pointing out his parole violation; and that he had turned

himself in despite ample opportunity to flee. (ASR 13-17) In addition, defense counsel asserted the potential for petitioner's rehabilitation as well as an assertion that the defense was a "crime of passion, in an emotional situation" sufficient to distinguish it from more grievous murders. (ASR 24-25) The evidence and argument relating to Hitchcock's family background and these clearly non-statutory mitigating factors were presented to the jury without objection or limitation by the prosecutor or trial judge in an obvious effort to secure a recommendation of life imprisonment. Similar argument with no relationship to statutorily enumerated mitigating circumstances was presented at the sentencing hearing itself where defense counsel urged the sentencing judge to take into consideration the testimony concerning

the defendant's background and specifically focused upon the turmoil in his family history. (SR 4-5) Defense counsel urged that the petitioner, while an intelligent individual, was "emotionally immature at times" and would be capable of rehabilitation if given the time to mature; furthermore defense counsel asked the court to consider the possibility of doubt as to the sufficiency of the evidence to demonstrate murder in the first degree. (SR 3-5)

This is the record which Hitchcock ignores when making his claim that he was denied a constitutionally improper individualized sentencing hearing because of a restricted belief of counsel. Indeed, to suggest that defense counsel would feel limited at the sentencing phase in presenting any potential mitigating evidence with

reference to non-statutory circumstances is to ignore the dogged determination exhibited by that same counsel at the trial phase despite repeated prosecutorial relevency objections and presentation of evidence as to Hitchcock's family background (e.g., the young age at which petitioner left home; whether petitioner's natural father was alive; the petitioner's age when his natural father died; the lack of violence previously exhibited towards children; the fact that petitioner was one of seven children; as well as the fact that his "attitude" towards his mother and family were good and that he always "minded" her and did what he was told). (TR 732-750) To suggest that this same counsel felt himself limited in the presentation of non-statutory mitigating circumstance evidence which was otherwise available to him and could

be utilized in argument against the imposition of the death penalty but for this belief is incredible especially in light of the total lack of any objection or limitation evinced by the prosecutor or trial judge at the advisory sentencing proceeding as well as the fact that such evidence was submitted and argued to both the jury and judge by counsel. The Florida Supreme Court, the federal district court and the court of appeals all properly concluded that the claim lacked factual support and respondent urges this court to leave undisturbed that determination inasmuch as it is based on a proper and reasonable analysis based upon the circumstances presented.

Certainly, the petitioner must concede that non-statutory mitigating evidence was presented and argued by counsel. Accordingly, Hitchcock's

argument must necessarily fail for the question is not, and never has been, how thoroughly, completely or satisfactorily evidence in mitigation was presented on his behalf. This court should not be confused with what petitioner would like to have been presented and whether non-statutory mitigating evidence was presented at all. As long as one single bit of non-statutory evidence was even attempted to have been introduced, the basis for his claim totally evaporates.

The respondent cannot emphasize enough that the record before this Court, as concluded by the court of appeals, is the authoritative source serving to rebut all the petitioner's arguments; that it contains clear offerings of non-statutory mitigating evidence adequately contradicts the claim of limitation that he presents, inter alia, through his vague affidavit

of counsel.

The record renders the principles of Blackledge v. Allison, 431 U.S. 63 (1977) inapplicable. The record does represent an insurmountable barrier to this attack; it is more than adequate to conclusively show that petitioner is entitled to no relief. Indeed, it definitely provides the conclusion that the claim, when measured against it, is "patently frivolous.".

II

THE COURT OF APPEALS PROPERLY UPHELD THE DISTRICT COURT'S SUMMARY DISMISSAL OF PETITIONER'S CLAIM THAT FLORIDA'S DEATH PENALTY WAS BEING ARBITRARILY AND CAPRICIOUSLY APPLIED BECAUSE OF RACE OF THE VICTIM BASED SYSTEMWIDE DISCRIMINATION ON STATISTICAL EVIDENCE LEGALLY INSUFFICIENT TO SUPPORT SUCH A CLAIM.

The petitioner, a white male who raped and brutally murdered his brother's white thirteen-year-old virgin step-daughter, argues that statistical evidence profferred to the district court demonstrated a statistically "significant" disparity in the ultimate imposition of the death penalty based upon the race of the victim of the offense. As noted by the petitioner, similar legal questions as to the propriety and disposition of Eighth and Fourteenth Amendment challenges to the application of otherwise facially valid death penalty statutes are also directly

presented in McCleskey v. Kemp, (No. 84-6811) pending before this Court. However, respondent submits that the instant case presents a more limited question as to the propriety of the district court's summary dismissal of his statistics-based race of victim discrimination claim as legally insufficient to demonstrate a basis upon which relief could be granted. The petitioner's claim that the statistical data submitted in conjunction with his assertion that the Florida death penalty statute was arbitrarily and capriciously applied was sufficient to require an evidentiary hearing and to ultimately prevail in his constitutional challenge to the statute as applied is without legal basis.

The district court determined that under Rule 4 of the Rules Governing Section 2254 Cases in the United States

District Court, the petitioner's claim of arbitrary application of the Florida death penalty statute was without arguable merit as determined in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) (JA 87-88). The district court judge further noted that any statutory scheme devised by a legislative body cannot insure completely uniform results but that given previous determinations, Florida's death penalty law contains adequate safeguards against capricious imposition of the death penalty and that given adherence to that statutory procedure, disparate sentencing results do not present a problem of constitutional implications absent an allegation and showing of "intentional discrimination" not made by Hitchcock. (JA 88).

The district court's summary denial

of Hitchcock's claim comports with virtually every other ruling on the subject by Florida and federal courts. As correctly noted by the petitioner, Florida's courts have consistently rejected similar bare statistical compilations, and specifically the particular studies presented in support of his race of discrimination claim in this case, as insufficient to state even a preliminary basis to sustain a claim for relief. Henry v. State, 377 So.2d 692 (Fla. 1979); Adams v. State, 380 So.2d 423, 425 (Fla. 1980); Meeks v. State, 382 So.2d 673, 676 (Fla. 1980); Thomas v. State, 421 So.2d 160, 162-63 (Fla. 1982); Riley v. State, 433 So.2d 976, 979 (Fla. 1983). The Florida Supreme Court followed that precedent in rejecting the petitioner's claim that an evidentiary hearing should have been

held on his motion for post-conviction relief at the state trial court level upon the limited statistical data presented.[5] The court noted that it had peviously determined the same data insufficient to justify a hearing citing to Thomas, supra, at 163, where the same figures and methodology presented here were rejected under the test announced in Spinkellink as "hypothetical"; "inadequately supported"; and

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[5]Respondent notes that the Gross and Mauro study upon which the petitioner's argument principally focuses was never presented to the state trial court judge in Hitchcock's motion for post-conviction relief and stay of execution or to the Florida Supreme Court in its review thereof. However, as properly determined by the federal courts, the statistical data of the Gross and Mauro study was no more compelling than the other data presented in terms of its constitutional implications and the same data has, as noted, been previously rejected as insufficient by Florida courts to justify relief.

insufficient to explain away "possible innocent explanations for the disparity." Hitchcock v. State, 432 So.2d 42, 43-44 (Fla. 1983).

The Spinkellink decision relied upon by the Florida courts and the federal district court below to summarily deny the petitioner's claim, rejected the same argument raised by Hitchcock, i.e., that statistical evidence submitted was sufficient to show a disparity in the application of capital sentencing based upon the race of the victim. The court opined that under its review of this Court's decisions establishing the boundaries for a properly drawn non-arbitrary death penalty statute, a state could rest assured that its death penalty law would not be later invalidated and otherwise proper death sentences vacated upon

claims of arbitrary or racially discriminatory application absent allegation and proof of some specific act or acts evincing intentional or purposeful discrimination against the petitioner, and that mere statistical evidence of an alleged racially disparate impact without further proof of intentional or purposeful discrimination was insufficient to state a claim for relief under either the Eighth or Fourteenth Amendments. 578 F.2d at 613-16; Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, 459 U.S. 882 (1982). The Spinkellink court further noted that even assuming a racially disproportionate impact based upon race of victim statistical data, the admission (also contained within the

studies relied upon by Hitchcock)[6] that all non-racial factors cannot be

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[6]The study evidence submitted to the state court (i.e. the testimony of Bowers and Pierce as to their statistical findings for the Henry case and the Foley study) clearly did not control for the numerous variables inherent in any potential capital sentencing case. Obviously, differences in the collection of evidence, production of witnesses and ease of prosecution, as well as the experience and effectiveness of counsel, the nature of the evidence submitted vis-a-vis the various statutory and mitigating circumstances, as well as the universe of non-statutory and mitigating factors that are inherent in an individualized sentencing determination make it impossible to isolate race of victim prejudice as the cause for the alleged disparity. Indeed, the Gross and Mauro study now principally argued by Hitchcock concedes that omitted data and unconsidered variables which are "endemic" and "inevitable" in mere statistical compilation studies could well explain the perceived race of victim disparity although they consider the possibility of substantial change in the figures "remote". Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27, 45-49, 105-110 (Nov. 1984).

controlled for or all potential non-race related explanations for their disparity rejected, undermined their utility.

The Spinkellink rationale has been repeatedly invoked by the Eleventh Circuit in addressing various claims of discriminatory racial impact in the Florida capital sentencing context. Upon that decisional cornerstone the court of appeals has repeatedly rejected, as it did in this case, the assertion that the particular statistical surveys presented to challenge the application of Florida's death penalty law were sufficient to state a cause for relief or adequate to justify an evidentiary hearing. Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir. 1986), cert. denied and stay of execution denied, 106 S.Ct. 1668 (1986); Thomas v. Wainwright, 767 F.2d

738, 747-748 (11th Cir. 1985), cert. denied 106 S.Ct. 1242 (1986), stay of execution denied, 106 S.Ct. 1623 (1986); Henry v. Wainwright, 743 F.2d 761, 762 (11th Cir. 1984), stay of execution denied, 105 S.Ct. 54 (1984); Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984), stay of execution denied, 105 S.Ct. 16 (1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), stay of execution denied, 464 U.S. 109 (1983); Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), cert. denied, 464 U.S. 1063 (1984); compare; Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985).

In the McCleskey case also before this Court, the court of appeals again voiced its conclusion that the statistical studies at issue in attacking Florida's death penalty statute are legally

insufficient to merit relief or an evidentiary rehearing and noted that that determination is "supported and possibly even compelled" by this Court's decisions in the stay of execution context in Sullivan v. Wainwright, 464 U.S. 109 (1983) (stay of execution denied); Wainwright v. Adams, 466 U.S. 964 (1984) (stay of execution vacated); and Wainwright v. Ford, 467 U.S. 1220 (1984) (state's application to vacate stay of execution denied on other grounds). The Eleventh Circuit noted that a plurality in Ford through Mr. Justice POWELL, found that the same statistical evidence at issue in this case had been deemed insufficient "to raise a substantial ground upon which relief might be granted" in Sullivan and Adams. 104 S.Ct. at 3499. Similarly, in Stephens v. Kemp, 464 U.S. 1027 (1984), Mr. Justice POWELL

writing for four dissenters from a stay of execution based upon the Baldus study which forms the basis for the McCleskey case, again noted the facial insufficiency of statistical studies like those rejected in Sullivan to demonstrate "intentional" discrimination:

> If the Baldus study is similar to the several studies filed with us in Sullivan v. Wainwright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), the statistics in studies of this kind, many of which date as far back as 1948, are merely general statistical surveys that are hardly particularized with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in Furman v. Georgia, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d. 346] (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in Gregg. Id. at 1030, n. 2.

The lack of constitutional impropriety

in Florida's statute despite the allegations of race of victim disparity is thus evinced by this Court's refusal to intervene on that basis in Florida cases to stay scheduled executions. Although Hitchcock predictably attempts to downplay the court of appeals' "speculation" as to the significance of these decisions, it is beyond comprehension to assume that given the qualitative difference and need for special care in judicial review constantly noted and applied by this Court in the irreversible context of death penalty cases, that executions would be allowed to take place if the claim raised was of constitutional merit. This Court, as correctly noted by the court of appeals below, has apparently accepted the conclusion of the Florida Supreme Court and the Eleventh Circuit that the statistical data at issue does not

sufficiently state a claim for relief as made clear by this Court in Sullivan:

> Applicant apparently first raised the issue of discriminatory application of the statute in a supplement to his most recent state habeas corpus petition, which was filed on November 15, 1983. Counsel for applicant, who is white, present voluminous statistics that they say support the claim of discriminatory application of the death sentence. Although some of the statistics are relatively new, many of the studies were conducted years ago and were available to applicant long before he filed his most recent state and federal habeas petitions. The Florida Supreme Court and both the federal District Court and the Eleventh Circuit have considered this data and determined in written opinions that it is insufficient to show that the Florida system is unconstitutionally discriminatory. On the basis of the record before this Court, we find there is no basis for disagreeing in this case with their decisions.

104 S.Ct. at 451 (1983).

The rationale in Spinkellink and subsequent decisions like Sullivan, Adams,

and Ford sent a clear and proper message that in validating Florida's death penalty statute in Proffitt v. Florida, 428 U.S. 242 (1976), this Court determined that the potential for arbitrary and capricious application of the capital sentencing procedure had been presumptively removed. Therefore mere statistical data which did not and could not control for all of the myriad variables in individualized sentencing determinations could properly be rejected on Eighth and Fourteenth Amendment grounds absent an allegation and proof of intentional and purposeful discrimination which cannot be shown under applicable equal protection standards through the use of simple statistical information which does no more than allegedly identify disparate impact without proof of discriminatory intent or motivation. Village of Arlington Heights

v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-66 (1977); Washington v. Davis, 426 U.S. 229, 238-42 (1976).[7] Since the mere statistical data like that which forms the basis of Hitchcock's discrimination claim is sufficient only to show a possible disparate impact in sentencing based upon race of victim,but does not and cannot control for the countless variables inherent in the complicated capital sentencing procedures, such studies can never on their own be sufficient to prove discriminatory

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[7]Hitchcock improperly urges the standard of review for Title VII cases noted in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). As this Court noted in Washington v. Davis, supra, that more rigorous standard for evaluating racial impact is not applicable outside the Title VII context. Id., 426 U.S. at 247-48.

intent or demonstrate that said intent is the only reasonable inference to be drawn under the circumstances.[8] See, Arlington Heights, supra at 264-66.

Respondent contends that given the

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[8]Respondent urges this Court to utilize this decisional vehicle to reject mere statistical attacks on the application of presumptively valid death penalty statutes as a matter of law, but alternatively submits that petitioner lacks standing to challenge on equal protection grounds the propriety of his death sentence because of an alleged discriminatory impact on black victims. See, Britton v. Rogers, 631 F.2d 572 (5th Cir. 1980), cert. denied, 451 U.S. 939 (1981). As the jury in each of the Florida and federal courts which considered or reviewed this case have determined, Hitchcock's conduct is deserving of the ultimate penalty; accordingly, he should not be heard to complain that his death penalty determination was improper because the lives of black victims have allegedly been devalued by our society in other cases. Indeed, this Court has not chosen to fashion such a remedy in comparable situations by abolishing statutes which are racially neutral on their face. See, Briscoe v. Lahue, 460 U.S. 325 (1983).

inherently limited nature of statistical studies vis-a-vis the amazingly complicated nature of capital sentencing procedures, it is impossible to prove or create an inference of intentional or purposeful discrimination against the backdrop of a capital sentencing statute specifically deemed sufficient by this Court to guide sentencing discretion and control arbitrary, and discriminatory sentencing results.

In Pulley v. Harris, 465 U.S. 37 (1984) this Court rejected the assertion that proportionality review was a constitutional prerequisite in the death penalty process. The Court further opined that while a capital sentencing scheme may produce occasional "abberational outcomes" the system could not be expected to be perfect. Id., at 881. The Pulley Court's rejection of the necessity of comparative

evaluation of death sentences imposed where a properly drafted statute controlling for arbitrariness through adequate guidelines for the imposition of death is involved (e.g., Florida's death penalty law) undermines Hitchcock's effort to require just such a comparative evaluation vis-a-vis sentences in black victim capital cases.

The McCleskey case also pending before this tribunal presents a statistical study of greater magnitude than the limited statistical evidence presented to the Florida courts in this case or the Gross and Mauro study belatedly presented to the federal courts. The Baldus study in McCleskey attempts to consider far more variables than the Florida studies, yet it still did not and could not control for all conceivable variables under the "extremely

complicated" Georgia death penalty process "in which no single factor or group of factors determines the outcome of a given case." McCleskey v. Kemp, 753 F.2d, 877, 896 (11th Cir. 1985). Even under this more detailed statistical data, the McCleskey court properly determined that Baldus' statistics alone could still not support a finding of an arbitrary or discriminatory result in McCleskey's case. The conclusion of the McCleskey court is most informative and assists in outlining the basic faults in utilizing strictly statistical evidence in attempting to find fault with the Georgia (or Florida) death penalty statutes as applied since in requiring that the sentencer in death penalty cases be afforded a measure of discretion, the resultant injection of numerous factors which cannot be controlled for necessarily

undermines the value of the statistical data obtained:

> The Baldus approach, however, would take the cases with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. From a legal perspective, petitioner would argue that since the difference is not explained by facts which the social scientist thinks satisfactory to explain the differences, there is a prima facie case that the difference was based on unconstitutional factors, and the burden would shift to the state to prove the difference in results from constitutional considerations. This approach ignores the realities. It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected

factors control the exercise of constitutionally required discretion.

* * *

> Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which Furman condemned. In pre-Furman days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional.

Id. 753 F.2d at 899.

Certainly, if as respondent urges the McCleskey court properly found the Baldus study insufficient to demonstrate constitutional invalidity in the

application of Georgia's death penalty statute, then that court's similar rejection of the Florida studies at issue here as even less compelling should likewise be accepted even if this Court ultimately rejects the respondent's basic assertion that statistical studies in the capital sentencing context must be deemed insufficient as a matter of law to challenge the application of a death penalty statute otherwise validated by this Court. The studies at issue in this case clearly do not control for anywhere near the number of factors involved in the operation of Florida's death penalty law from the investigative phase through trial, sentencing, and appeal. These studies were, therefore even less deserving of legal consideration than the Baldus statistics which the Eleventh Circuit has determined legally

insufficient to support Eighth or Fourteenth Amendment challenges to the Georgia statute. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985); McCleskey v. Kemp, supra. See also, Rook v. Rice, 783 F.2d 401,407 (4th Cir. 1986) (rejecting argument that North Carolina's capital statute was being arbitrarily and discriminatorily applied based upon the race of the victim since the data and testimony submitted by Doctor Gross insufficiently demonstrated a pattern of discrimination in application or intentional discrimination).

The individualized sentencing determination required in the capital sentencing context requires consideration of all relevant non-statutory mitigating factors (see argument Point I) in

conjunction with various statutory aggravating circumstances thus injecting numerous non-racial variables into the process to be combined with the multitude of factors also inherent in pre-trial investigation as well as the trial itself (e.g., the ease or difficulty in the collection, marshalling, and presentation of legally admissible evidence; the weight attached to such evidence by the fact finder; the skill and experience of the prosecutor as well as his perception of the case, etc.). How can it be said then that statistical data which cannot control for such factors can ever be relied upon to demonstrate a society based discrimination against black victims in Florida, Georgia, and virtually nationwide, when no such society based prejudice is demonstrated against black defendants in the death penalty context?

Is it not more reasonable to assume that the lack of race of defendant-based discrimination evident in the statistics demonstrates that the statutes deemed sufficient to control arbitrariness and discrimination by this Court are functioning well, than to assume that some invidious, deep-seated race of victim-based discrimination has nevertheless infested our society and is manifesting itself throughout the death penalty process and skewing the imposition of the ultimate penalty? Certainly, if racial discrimination was the motivating factor in the alleged disparity in death sentences for white victims then that bias would be expected to reveal itself in the more direct form of discrimination based upon the race of the killer.

It has become clear that capital punishment continues as an accepted and

necessary component in a majority of this country's penal systems as demonstrated by the resurrection, by a multitude of jurisdictions, of the penalty after Furman in various forms hoped to be sufficient to satisfy the somewhat unspecific requirements of the plurality. Some states failed to correctly guess the eventual import of Furman and their mandatory death penalty statutes were rejected, Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); but others, including Florida, drafted statutes which guided the sentencer's discretion and provided other checks on the ultimate sentencing determination (e.g., through automatic state appellate review proceedings) to further assure that the arbitrariness, discrimination, and capriciousness targeted in Furman would be removed. Now

ten years after Florida's reformed death penalty law was specifically validated against arbitrariness challenges by this Court and a modicum of success achieved in carrying out the will of its people in punishing with death those who have been convicted and sentenced under the constitutionally validated system and the painstaking review that accompanies such sentences at both the state and federal court level, the claim is raised that this Court should once again allow arbitrariness challenges to that statute upon mere statistical data which at best suggests the <u>possibility</u> of a race of victim based disparity in sentencing. Would justice be served by invalidating an otherwise constitutional expression and application of the collective will of the people of a sovereign state upon such an inexact statistical basis where to do so

would not alleviate the claimed prejudice,(i.e., the devaluation of the lives of black murder victims) and would simply assure that all those sentenced to death for murdering whites (even those who rape and murder thirteen year olds) would not receive the punishment deemed necessary and appropriate by the people of Florida, the trial jury, the trial judge, and the Florida Supreme Court in this case because of an alleged societal prejudice which appears only when a black is the victim of a murder and <u>not</u> when he is in fact the murderer? If we accept the petitioner's premise, would it not then be necessary to preclude executions for all those who murder black victims to ensure consistency and non-discrimination in application -- a strange remedy to the perceived problem of receiving adequate retribution for the murderers of blacks

and adequate enforcement of the death penalty statute to protect the black population.

Furthermore, if such society based race of victim discrimination occurs in death cases where Florida judges actually impose the sentence, is it not reasonable to assume that such invidious discrimination exists at all levels of criminal punishment necessitating the invalidation of all state penal statutes? Does "equal protection" in such an imperfect society therefore require that no one be punished no matter how deserving of punishment under their peculiar factual circumstances so as to assure equality in application, or more correctly, non-application, of a facially non-discriminatory statute because of pervasive subconscious prejudice possibly demonstrated by mere statistical data?

To ultimately accept the petitioner's race-of-victim disparity argument would be to reject in toto Florida's death penalty statute upon a mere statistical possibility of a non-governmental societal prejudice without apparent hope of correction especially since the specific perpetrator or perpetrators (be they mere citizens, investigators, prosecutors, juries, or judges) of this alleged disproportionate punishment remain unidentified. Gross and Mauro, supra, at pp. 106-110. Florida like a majority of states, has invested its time and energy and answered the demands of its people by drafting a death penalty statute sufficient to address the concerns of Furman and that statute has been determined by this Court adequate to channel discretion and presumptively remove arbitrariness and discrimination in

capital sentencing. Sixteen men have been executed in this state and hundreds more prosecuted, convicted, and sentenced under the implicit assurance that in applying the new statute as drafted the state could seek to impose the punitive will of its people through the ultimate penalty in the appropriate situation. Many others have been executed under statutes in other states which may very well have this same form of inherent prejudice lurking in its citizens and officials but which have not been the subject of studies or adequate statistical data. Hitchcock has not alleged nor can he demonstrate that he was sentenced to death because his victim was white. Indeed, the heinousness of his crimes speak for themselves. It would be utterly preposterous to assert in this case that had he raped and murdered a thirteen-year-old <u>black</u> girl that the

death penalty would not have resulted. He has neither alleged nor demonstrated an intentional governmental effort to discriminate against him or others in the application of Florida's death penalty statute upon any racial factor. To accept his argument that no matter how grievous his crime he should be absolved of the proper and ultimate punishment for its commission upon the mere statistical conjecture presented will not only serve to clearly undermine the continued application of any death penalty statue in this nation but will also clearly "devalue" the life of the young female victim brutalized by the petitioner as well as the society that depends upon its proper y enacted death penalty law to serve its retribution and deterrence functions.

CONCLUSION

Based on the above and foregoing, we respectfully request this Court to affirm the judgment of the Eleventh Circuit Court of Appeals which determined that Hitchcock was entitled to no habeas relief.

Respectfully submitted,

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